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Challenges in managing partners

LNB News 20/02/2015 35

Practice Management analysis: What are the biggest employment issues law firms face in relation to partners? Nicholas Lakeland, partner and head of the employment and pensions team at Silverman Sherliker, discusses best practice for managing partners.

What are the employment law issues concerning partners?

The first question that one must ask oneself is whether a partner is a 'partner' under the definition in the Partnership Act 1890 (PA 1890). There is a question of whether an individual is a 'salaried partner' or a 'fixed-share partner' and the subsequent question that arises is whether the individual is either an employee or a worker employed by the partnership (or neither). The answers to these questions will affect the individual benefits and rights the individual has against the partnership.

There are also partners who are really members of a limited liability partnership (LLP) but who, for obvious reasons, do not want to describe themselves as members and use the word partner instead. In a traditional partnership if the individual is a partner of the partnership then he or she cannot be employed by it either as an employee or a worker. If we remind ourselves that in accordance with the definition of a partnership in PA 1890, s 1(1), there must be a business which is carried on by two or more persons in common with a view to a profit.

Whether the salaried partner or the fixed-share partner is a partner of the firm is a question which remains behind the curtain and is a matter of agreement between the individual and the firm. The question remains, did the parties intend to form a relationship in the nature of a partnership within the meaning of the PA 1890?

With LLPs, the Limited Liability Partnerships Act 2000, s 4(4) states that:

'A member of a limited liability partnership shall not be regarded for any purpose as employed by the limited liability partnership unless, if he and the other members were partners in a partnership, he would be regarded for that purpose as employed by the partnership.'

In short, salaried partners who are in fact 'salaried members' of an LLP are in fact employees with a title and not 'real' partners.

It is worthwhile noting that in the case of *Clyde & Co LLP and another v Bates Van Winkelhof* [2014] UKSC 32, [2014] All ER (D) 173 (May) it was held that an equity member of an LLP can be a worker under the Employment Rights Act 1996, s 230(3)(b) (ERA 1996) and benefit from the associated whistleblowing protection. Workers not only have rights as whistleblowers but also in relation to a number of other matters such as

- o unlawful deductions from wages
- o the right to be accompanied
- o the national minimum wage

- o working hours
- o paid holiday
- o part-time working
- o certain rights relating to trade union membership
- o pension auto-enrolment

What employment law issues can arise out of the change of status of a law firm (for example a change from a partnership to an LLP or to an alternative business structure (ABS))?

A traditional partnership means that one cannot be employed by oneself, it is a legal impossibility. Within an LLP the salaried partners enjoy and benefit from employment rights and are classified as employees. Within an LLP, fixed share or equity partners cannot be classified as employees but can be classed as workers following the judgment in *Clyde & Co LLP* and therefore enjoy certain employment rights as set out above.

The change from a traditional partnership to an LLP should not result in a change in the tax status of the salaried partners since they will have always been taxed under Schedule E. The status of fixed share partners is, however, more problematic because of the changes to the tax treatment introduced by HMRC which effectively mean that if you really want to continue to be taxed on a self-employed basis under Schedule D then you need to:

- o ensure that you have put up some equity capital in the firm
- o be genuinely involved in the decision making process of the firm, or
- o genuinely take a risk as to your level or remuneration

Once a partnership or an LLP converts to an ABS that is likely to be in the form of a limited company so then all partners will effectively become employees taxed on Schedule E.

One legal requirement which I have yet to mention will be the need to comply with the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246 (TUPE). Each time assets and businesses transfer from one entity to another there is the likelihood that TUPE will apply and you will need to inform and consult with the employees.

Are there any employment law issues that can arise concerning partner or solicitor performance management or exits?

Equity partners or equity members of an LLP are not employees so the performance management or exit of a partner must be carried out in accordance with the partnership agreement or the LLP agreement. Often both are lacking in detailed mechanisms as to how to deal with underperforming partners although usually long, two or three year restrictive covenants are in place preventing a departing partner from poaching clients of the firm. Retirement is an obvious issue for the profession with the much heralded *Seldon* case (see *Seldon v Clarkson Wright & Jakes* UKEAT/0434/13/RN, [2014] All ER (D) 262 (Jul)) providing guidance as to how to prevent partners 'bed blocking' progress for younger partners. As in any walk of life, discrimination is prohibited so for partners that is the most fruitful area of attack if one does not have the protection of full employment rights.

Salaried partners are, however, fully protected by ERA 1996 in the same way as all other employees and cannot therefore be unfairly or wrongfully dismissed provided they have the requisite length of service to benefit from the statutory protections.

How can law firms handle requests for some working practices like flexible working, with client demands and expectations?

With difficulty. Clients want 24/7 service and are often unreasonably demanding and consider their need is immediate when in fact it may not be but in the competitive environment one works in the client is always right. Modern technology helps you to be accessible but we are also slaves to our Blackberrys and iPhones. The reality is that it is now easier and more realistic to work flexibly because one can easily work remotely but the price to pay is that even when you are off work you are in fact still available and will have to respond.

The key is having a strong, effective and responsive back-up team in the office who can assist with the client requirements. However, that does mean the smaller the organisation the less back-up they have and the more difficult it will be to work flexibly--that simply has to be accepted as a fact of life in modern legal practice.

Are there any employment law issues regarding secondments to other offices or clients or other long term absences?

Employment rights are usually not affected if secondments or absences are agreed and are in the UK. The position can be different if the secondment is to an overseas office because in those cases dual contracts will be required with the need to take into account different tax regimes and the added costs of being an ex-patriate. The firm and the secondee may be operating in a more dangerous overseas environment so issues may have to be considered as to the safety and welfare of the lawyer and any of their accompanying family. Often difficulties arise when the employee returns from a secondment and there is no position available to them because the vacuum created by their departure has in their absence been filled by other lawyers and there is simply no position available to the returning lawyer. In those circumstances a redundancy situation does arise and the lawyer has to depart.

Interviewed by Diana Bentley.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.

Document information

Published Date

20 February 2015

Jurisdiction

England & Wales

Related Documents

Related Legislation

Partnership Act 1890; Limited Liability Partnerships Act 2000

Related Cases

Clyde & Co LLP and another v Bates Van Winkelhof [2014] UKSC 32, [2014] All ER (D) 173 (May); Seldon v Clarkson Wright & Jakes UKEAT/0434/13/RN, [2014] All ER (D) 262 (Jul)